

GOVERNMENT OF THE DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:)	
)	
CHILDREN’S NATIONAL MEDICAL CENTER)	CAB No.: P-1144
111 Michigan Ave. N.W.)	
Washington, D.C. 20010)	
)	
)	
Under Solicitation No.: Doc561707)	

DISTRICT OF COLUMBIA’S MOTION TO DISMISS AND AGENCY REPORT

Pursuant to Rules 305.1 and 306.1 of the Rules of the District of Columbia Contract Appeals Board (“Board”), 49 DCR 2078 (March 8, 2002), for the reasons stated below, the District of Columbia (“District”), respectfully files its Motion to Dismiss and Agency Report with respect to the above-captioned protest filed with the Board by Children’s National Medical Center (“CNMC” or “Protester”) on August 23, 2021, and served on the District on August 24, 2021. The underlying contract is for implementing the District of Columbia Mental Health Access in Pediatrics (“DC MAP”), which the Department of Behavioral Health (“DBH”) maintains to support the integration of primary and mental health care for children, youth and their families. The protest raises the following issues: (1) Whether CNMC timely filed its protest since notice of its removal from the competition was provided to a CNMC employee on July 20, 2021; (2) Whether the District properly deemed CNMC’s proposal non-responsive because CNMC did not include a subcontracting plan required by the solicitation; (3) Whether the District properly dismissed CNMC’s subcontracting waiver request because it was submitted on the deadline for proposals; (4) and whether the contract in question is exempt from the subcontracting plan requirements under the District’s COVID-19 response emergency because

DC MAP service are provided “in furtherance of, or related to the District’s response to, the District’s response to the COVID-19 emergency” under D.C. Code § 2–218.91(f).

The District responds that the Board must dismiss this protest both on procedural and substantive grounds. First, the protest should be dismissed because CNMC did not timely file its protest with the Board. Second, CNMC’s protest fails on the merits because District procurement law requires offerors to include complete subcontracting plans with their initial proposals to be responsive and requires subcontracting waiver requests to be submitted before proposals are due. Finally, the protest should be denied because the solicitation was not issued as an emergency procurement, and the requirement is in fact a pre-existing program that is unrelated to the District’s COVID-19 emergency response.

I. EXHIBITS

The following relevant documents are attached to this Motion to Dismiss and Agency Report:

- 1) Procurement Chronology (Exhibit 1)
- 2) Solicitation No. Doc561707 (Exhibit 2)
- 3) Determination of Non-Responsiveness (Exhibit 3)
- 4) CNMC Protest Letter (Exhibit 4)
- 5) Protestor’s Technical Proposal (Exhibit 5)
- 6) Documentation Involving [REDACTED] (Exhibit 6)
- 7) CNMC E-mail to OCP Dated August 17, 2021 (Exhibit 7)
- 8) Declaration of Contracting Officer Elouise Fripp (Exhibit 8)
- 9) CNMC Request for Waiver June 9, 2021 (Exhibit 9)

II. STATEMENT OF FACTS

On May 19, 2021, the District Office of Contracting and Procurement (“OCP”), on behalf of the Department of Behavioral Health (“DBH”), issued a Request for Proposals (“RFP”) Solicitation No. Doc561707 in the open market seeking an experienced and qualified contractor to implement the Mental Health Access in Pediatrics Program (DC MAP) to support the integration of primary and mental health care for children, youth and their families within the system of care. (Exhibit 1; Exhibit 2). Proposals were due via the Ariba ESourcing software by 2:00 p.m. on June 9, 2021. (Exhibit 2). DBH contemplated awarding a single, requirements type contract with fixed hourly rates to the responsible offeror whose offer conforming to the solicitation will be the most advantageous to the District. (Exhibit 2).

The Solicitation No.561707 included language mandating that offerors include subcontracting plans with their proposals when required by law. (Exhibit 2). The solicitation stated that “[a]n offeror responding to this solicitation that is required to subcontract shall be required to submit with its proposal, any subcontracting plan required by law.” (Exhibit 2, Section B.5). The solicitation clarified when subcontracting plans were required by law. The RFP explicitly incorporates the Procurement Practices Reform Act’s (“PPRA”) requirement that “[f]or contracts in excess of \$250,000, at least 35% of the dollar volume of the contract shall be subcontracted.” (Exhibit 2, Section B.6, *citing* D.C. Code § 2-2818.46(a)). The RFP language includes underlined instructions for applicants to obtain the Subcontracting Plan form on the OCP website by clicking on “Required Solicitation Documents” under the Quick Links header, and references Section H.9, entitled “SUBCONTRACTING REQUIREMENTS,” for more information related to the subcontracting requirements. (Exhibit 2).

The solicitation subsection H.9.1 made the subcontracting plan requirements even more clear than the previous Section B language. (Exhibit 2). Specifically, Section H.9 of the RFP provided in pertinent part as follows:

H.9 SUBCONTRACTING REQUIREMENTS

H.9.1 Mandatory Subcontracting Requirements

For all contracts in excess of \$250,000, at least 35% of the dollar volume of the contract shall be subcontracted to qualified small business enterprises (SBEs).

H.9.1.2 If there are insufficient SBEs to completely fulfill the requirement of paragraph H.9.1.1, then the subcontracting may be satisfied by subcontracting 35% of the dollar volume to any qualified certified business enterprises (CBEs); provided, however, that all reasonable efforts shall be made to ensure that SBEs are significant participants in the overall subcontracting work.

H.9.1.3 A prime contractor that is certified by DSLBD as a small, local or disadvantaged business enterprise shall not be required to comply with the provisions of sections H.9.1.1 and H.9.1.2.

(Exhibit 2). Additionally, the RFP solicitation clearly states in Section L.2.7 of the Contract Award section that “[t]he District will reject any offer that fails to include a subcontracting plan that is required by law.” (Exhibit 2).

CNMC submitted a proposal responding to the RFP on June 9, 2021, along with a Request for Waiver from the subcontracting requirement. (Exhibit 1, Exhibit 9). [REDACTED]

[REDACTED] (Exhibit 5). CNMC is the incumbent contractor for this requirement and has provided DC MAP services in partnership with [REDACTED] since 2015. *Id.* While CNMC acknowledged it planned to continue subcontracting to [REDACTED] through this previous partnership if awarded the contract, CNMC did not provide a subcontracting plan.

On July 12, 2021, the Contract Specialist determined that CNMC did not submit a subcontracting plan with its proposal, as required by law. (Exhibit 1). On July 20, 2021, OCP notified CNMC of its determination that their submission was non-responsive by letter via e-mail to [REDACTED] [REDACTED] for CNMC. (Exhibit 2). The letter notified CNMC that its proposal was deemed non-responsive because of CNMC's "failure to submit a subcontracting plan that is required by law [since] the dollar value of the response/offeror is in excess of \$250,000.00." (Exhibit, 3).

III. MOTION TO DISMISS

A. CNMC FILED THIS PROTEST WITH THE BOARD UNTIMELY, RESULTING IN THE BOARD'S LACK OF JURISDICTION OVER THE PROTEST

The Protestor's challenge should be dismissed because it was filed untimely with the Board and therefore the Board lacks jurisdiction over the instant protest. Under the Board rules, all protests must be filed with the Board no later than ten (10) business days after the basis of the protest is known or should have been known, whichever is earlier." Rule 302.2(b); D.C. Code § 2-360.8(b)(2). The Board's jurisdiction to hear cases is defined by statute, and the "time period for filing stated in the Act is a prerequisite to Board jurisdiction and cannot be waived." *In re Enhancement Group, Inc.*, DCCAB No. P-613, 2000 WL 992454 (D.C.C.A.B. May 2, 2000); *see also Protest of: National Services Contractors, Inc.*, DCCAB No. P-1117, 2020 WL 8182310 (D.C.C.A.B. Mar. 16, 2020) (where protestor filed its protest untimely, the Board held "we are without jurisdiction to decide it").

In the instant protest, CNMC received proper notice of the CO's non-responsive determination in a timely manner, and thus the Board must dismiss the protest under the PPRA and its binding precedent. Protestor argues that because the CO sent the non-responsiveness determination letter by email to [REDACTED], [REDACTED] at CNMC, instead

of the contact person named on the technical proposal, [REDACTED] of DC MAP at CNMC, that Protestor was unaware of its removal from the competition until August 18, 2021. (Exhibit 4). The CO e-mailed the non-responsiveness determination notice letter to [REDACTED]s on July 20, 2021. (Exhibit, 1; Exhibit 7). The CO e-mailed [REDACTED] because he was a part of the contract procurement process with knowledge and authority for CNMC regarding the proposal, and whose name, signature and contact information was on several key documents submitted to DBH. (Exhibit 6).

Under established Board decisions, this emailed letter of non-responsiveness is sufficient notice for CNMC and started the 10-business day clock under the PPRA and Board Rules for CNMC to file its protest challenging the non-responsiveness determination. Board Rule 302.2(b); D.C. Code § 2-360.8(b)(2). In *Protest of: Fort Myer Construction Corporation*, the CO sent a request for bid extension to the company's vice president rather than its president. DCCAB No. P-1069 2018 WL 3694123 (D.C.C.A.B., April 26, 2018). Fort Myer argued that the president was "responsible for the procurement and [] also was the addressee on the bid extension letter." *Id.* The Board held that "Fort Myer received notice of the District's request for bid extension when the protester's Vice President received the District's email." *Id.* Furthermore, the Board stated that "[a]ctual notice to Fort Myer's President was not required when notice was otherwise received by the company." *Id.*

This principle is supported by decisions of the Government Accountability Office ("GAO"). The GAO has long held "that actual notification to a company's designated point of contact is not required to constitute notice under our Bid Protest Regulations, where notice is otherwise received by the firm." *Hawker Beechcraft Defense Co.*, B-406170, 2011 CPD ¶ 285, 2011 WL 6540509, *3 (Comp. Gen. Dec. 22, 2011). The GAO further reasoned that the fact

“[t]hat it took [protestor] 11 days to route the notice of exclusion to the appropriate person does not toll the filing deadline imposed by our regulations, or the statutory deadline to request a required debriefing.” *Id.* In general, the GAO seeks to “prevent [the] timeliness rules from becoming meaningless,” and therefore any “exceptions are strictly construed and rarely used.” *Id.*, citing *Air Inc.-Recon.*, B-238220.2, Jan. 29, 1990, 90-1 CPD ¶129. Under GAO precedent, “the mechanical receipt of the email during the firm's regular business hours ... constitute[s] notice” on that day for “the purposes of [GAO] timeliness rules.” *Golight Inc.*, B-401866, 2009 CPD ¶ 184 (Comp. Gen. Sept. 10, 2009).

The Board must follow its established standard for effective notice, which clearly requires the offeror entity to actually receive notice by e-mail to recipients at the organization-level and does not require receipt by specific people within an organization, even if named as the point of contact. The fact that notice was sent by e-mail to an executive level employee with purview over government contracts and grants, and who had been personally involved in this procurement process, is sufficient. Based on both Board and GAO precedent, the Board must deny CNMC’s protest as untimely, and therefore the Board lacks jurisdiction over this protest.

IV. AGENCY REPORT

B. PROTESTOR’S PROPOSAL WAS NON-RESPONSIVE BECAUSE IT DID NOT INCLUDE THE LEGALLY REQUIRED SUBCONTRACTING PLAN

In the alternative, should the Board find that it does have jurisdiction under the PPRA, the District respectfully requests the Board to find that CNMC’s protest fails on the merits. The RFP solicitation document and the law are both clear on the requirement for all offerors to submit a subcontracting plan with their proposal as part of a fully responsive offer. Furthermore,

CNMC's attempt to fit this RFP into the COVID-19 related emergency procurements exception to the subcontracting plan requirement is unavailing.

The RFP required the offerors to submit a Subcontracting Plan with their proposal submission in accordance with Section H.9 of th[e] solicitation.” (Exhibit 2, Section L.2.10). The terms of the RFP made clear that this subcontracting requirement applied to “contracts in excess of \$250,000,” which would require “at least 35% of the dollar volume of the contract shall be subcontracted in accordance with section H.9.” (Exhibit 2, Section B.6, *citing* D.C. Code § 2-218.46). The terms of the RFP required the Subcontracting Plan (Attachment J.8 to the RFP Solicitation) to “be complete, and [that] the services provided by the CBEs must be pursuant to the services and requirements indicated in the solicitation.” *Id.* The RFP also included the Subcontracting Plan form via the OCP website. *Id.*

The CO correctly determined that CNMC's proposal was non-responsive under District procurement law and the specific terms of the RFP. In *Protest of: Conduent State Healthcare, LLC*, the Board sustained a protest challenging a competing offeror's “proposal [that] was non-responsive for failing to submit a subcontracting plan that was required by law and by the RFP requirements.” DCCAB No. P-1120, 2020 WL 5501255 (D.C.C.A.B. Aug. 20, 2020); *see also Martins Constr. Corp.*, DCCAB No. P-0969, 2016 WL 8230983 (D.C.C.A.B. Nov. 23, 2016) (offerors must timely submit subcontracting plans to be responsive), *R. Rea Corp.*, DCCAB Nos. P-0991, P-0992, 2016 WL 3194273 (D.C.C.A.B. May 31, 2016) (agencies must request subcontracting plans before awarding a contract). The *Conduent* Board held that “the CO's failure to reject [the offeror's] initial proposal as non-responsive for failure to submit a compliant 35% SBE/CBE subcontracting plan was in violation of the terms of the RFP and District procurement law [at D.C. Code § 2-218.46(d), (e)].” *Id.* The *Conduent* decision made clear that

“an offeror must submit a 35% SBE/CBE subcontracting plan with its proposal” for the CO to determine the proposal to be responsive. *Conduent*, DCCAB No. P-1120, 2020 WL 5501255, *fn. 14 (D.C.C.A.B. Aug. 20, 2020). Thus, the Board must dismiss this protest ground.

The facts of this protest closely align with those of *Protest of: Conduent State Healthcare, LLC*, in which the offeror’s initial proposal was found to be non-responsive because it lacked a subcontracting plan. DCCAB No. P-1120, 2020 WL 5501255, (D.C.C.A.B. Aug. 20, 2020). The offeror eventually submitted a partially compliant subcontracting plan, but like CNMC, the initial proposal completely lacked a subcontracting plan. The *Conduent* decision made clear that the CO does not have discretion to determine an offer responsive where the potential contractor does not include a fully compliant subcontracting plan with its proposal. The Board made clear that the CO was not authorized to permit an offeror to submit updated subcontracting plans either, and that the CO must reject the proposal as non-responsive upon submission without a compliant subcontracting plan. *Id.* Therefore, the CO in this case not only properly determined CNMC’s proposal was non-responsive, but the CO was not permitted by law to reach any other conclusion. The Board must follow the precedent established in *Conduent* and deny CNMC’s protest on this basis, since the proposal did not include a subcontracting plan.

C. CNMC DID NOT PROPERLY REQUEST A SUBCONTRACTING PLAN WAIVER, NOR WOULD THE WAIVER REQUEST CURE THE PROPOSAL

CNMC argues that it submitted a waiver request in lieu of a subcontracting plan, implying this should be sufficient for responsiveness. (Exhibit 9). While the terms of the RFP and statutory law are both clear that the subcontracting plan itself is required as part of the proposal, CNMC’s waiver request was not effective in any event. Furthermore, regardless of the effect of the waiver request, the Department of Small and Local Business Development (DSLBD”) did not approve a waiver for CNMC from the subcontracting requirement. DSLBD,

Agency Subcontracting Requirement Waiver Requests, *available at*

<https://dslbd.dc.gov/service/agency-subcontracting-requirement-waiver-requests>. This was an issue also discussed by the Board in the *Conduent* decision. The Board wrote that “an offeror must submit a 35% SBE/CBE subcontracting plan with its proposal and *any waiver of this requirement must be submitted by the CO to DSLBD before the time proposals are due.*” *Protest of: Conduent State Healthcare, LLC*, DCCAB No. P-1120, 2020 WL 5501255, fn. 14 (D.C.C.A.B. Aug. 20, 2020) (emphasis added). In the instant protest, CNMC submitted its waiver request to the CO on June 9, 2021, the actual deadline for the proposals. (Exhibit 9, Exhibit 2). Even if a defense or safe harbor was available by requesting a waiver from an agency, CNMC’s attempt to request a waiver in the instant protest was not sufficient because such waiver requests must occur before the proposal deadline. *Conduent*, at fn.14. Thus, the Board must dismiss this protest ground.

D. DC MAP IS NOT PART OF THE DISTRICT’S COVID-19 EMERGENCY RESPONSE

CNMC attempts to defend its decision not to submit a subcontracting plan by claiming that this RFP was either related to the District’s COVID-19 public health response or an emergency procurement. (Exhibit 4). This claim is not supported in fact or in law. The DC MAP solicitation was not “made in furtherance of, or [] related to, the District’s response to the COVID-19 emergency.” D.C. Code § 2-218.91(f). First, the CO involved in this RFP did not solicit proposals using the emergency process, but rather published the solicitation under the competitive seal proposal method and reviewed and evaluated offerors’ technical and price proposals. (Exhibit 8). In addition, the terms of the RFP document describe the solicitation type as a “sealed proposal (RFP),” and not an “emergency” solicitation. (Exhibit 2). Finally, the provision of mental health services is not reasonably related to the primary effects of COVID-19.

CNMC’s claim that the RFP is related to the COVID-19 emergency response or based on the Mayor’s COVID-19 Order fails legally because the procurement does not comport to the emergency procurement process. The Mayor’s COVID-19 emergency order does not provide DBH with authority related to the DC MAP program or related procurement. Mayor’s Order 2021-096, *End of Public Health Emergency and Extension of Public Emergency*, ¶ III(3)(b) (July 24, 2021); Mayor’s Order 2020-045, *Declaration of Public Emergency: Coronavirus (COVID-19)*, ¶¶ II(R), II(U) (March 11, 2020) (authorizing the D.C. Chief Financial Officer “to approve disbursement of all appropriations necessary to carry out [the] Order... [n]otwithstanding the [PPRA],” and immediately implementing the District Response Plan, respectively). The Mayor’s statutory basis for the emergency order is D.C. Code Section 7-2304, which provides authority for the “provisions of the District of Columbia response plan as issued by the Mayor... [to be] implemented ... without regard without regard to established operating procedures relating to the performance of ... entering into contracts” or “incurring obligations.” D.C. Code § 7-2304(b)(2). However, the current District Response Plan (“DRP”) does not include authorizations to DBH for the emergency operation of DC MAP. District Response Plan, 78-80 (March 2017), *available at* https://hsema.dc.gov/sites/default/files/dc/sites/hsema/page_content/attachments/District%20Response%20Plan.pdf. Although the DBH is included in the DRP, none of its 17 emergency support functions includes the services or activities of the DC MAP or the RFP solicitation. *Id.*

CNMC cannot base its claim of exemption from the subcontracting plan requirement on any other emergency procurement basis. Unless “otherwise authorized by law, all District government contracts shall be awarded by” the listed statutory source selection methods. D.C. Code § 354.01(a)(1). Such “emergency procurement procedures shall not be used for contracts

exceeding 90 days.” D.C. Code § 354.05(d). The procedures generally involve the contracting officer “issu[ing] oral orders or notice to proceed to provide services or goods to the District” which must be “reduced to writing within 3 business days.” D.C. Code § 354.05(c). These procedures were not used for this requirement, and therefore the RFP for implementation of DC MAP could not be authorized on an emergency basis.

Because DBH did not issue the DC MAP RFP under the Mayor’s COVID-19 Public Emergency Order or statutory emergency procurement authorities, nor is it related to the District’s response to COVID-19, the protest cannot be sustained based on Protestor’s argument that its proposal was exempt from the subcontracting plan requirement.

CONCLUSION

Based on the foregoing arguments, and in accordance with applicable Board decisions and District procurement law, the District respectfully submits that the Board must deny CNMC’s protest on procedural defects because the protest was filed untimely, and the Board therefore lacks jurisdiction. In the alternative, should the Board find it does have jurisdiction, the protest also fails on the merits because CNMC did not include a legally required subcontracting plan with its proposal and its request for waiver was neither effective nor a defense for its non-responsive proposal. Finally, the CNMC’s proposal was not exempt from the subcontracting plan requirement under the District’s emergency procurement statute or the Mayor’s COVID-19 Public Emergency Order, nor does it relate to the District’s COVID-19 response.

Dated: September 13, 2021

Respectfully submitted,

KARL A. RACINE
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/s/Hunter S. Cox
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CERTIFICATE OF SERVICE

I hereby certify that, on September 13, 2021, the District caused to be served on the following Protester via *File & ServeXpress* a copy of the foregoing District's Motion to Dismiss and Agency Report in CAB No. P-1144:

Pro Se Parties

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/s/Hunter S. Cox
HUNTER S. COX
Assistant Attorney General

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

EXHIBIT 1
TO
THE DISTRICT OF COLUMBIA COMBINED MOTION TO DISMISS
AND AGENCY REPORT

PROTEST OF CHILDREN'S NATIONAL MEDICAL CENTER,
CAB NO. P-1144

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of Contracting and Procurement



MEMORANDUM

TO: Hunter Cox
Assistant Attorney General

FROM: Elouise Fripp
Contracting Officer

DATE: September 1, 2021

SUBJECT: Procurement Chronology for Solicitation No. Doc561707 Request for Proposals –
Implement the Mental Health Access in Pediatrics Program (DC MAP)

The following is the Procurement Chronology for the subject solicitation:

On **May 19, 2021**, The District of Columbia (District) Office of Contracting and Procurement (OCP), on behalf of Department of Behavioral Health (DBH), issued in the open market a Request for Proposal Solicitation (Doc561707), seeking an experienced and qualified contractor to implement the Mental Health Access in Pediatrics Program (DC MAP) to support the integration of primary and mental health care for children, youth and their families within the system of care was issued through the open market on the OCP website at www.ocp.dc.gov and advertised in the Washington Times Newspaper.

May 28, 2021, A pre-proposal conference was held at 11:00 a.m. via invite on Microsoft Teams.

June 4, 2021, Amendment #1 was issued to revise the Price Schedule, revise Section C and Section M of the Solicitation and provide answers to the questions submitted by potential offerors.

June 9, 2021 at 2:00p.m. date for receipt of proposals due in ESourcing. Two proposals were received in response to the solicitation. The proposals were submitted by Paving the Way Multi-Service Institute, and Children's National Medical Center.

June 14, 2021, Technical Proposals sent to the Source Selection Technical Evaluation Panel (SSTEP) for review and evaluation.

July 6, 2021, SSTEP completed the evaluation process. Evaluation and Consensus meeting with SSTEP consisting of three (3) staff members from DBH and the Contracting Officer via Microsoft Teams to record brief comments that insight into why individuals awarded points or failed to award points based on the RFP evaluation criteria. After the consensus meeting, major discrepancies were cited in the technical proposal submitted by Paving the Way Multi Service Institute. The SSTEP indicated questions about the proposal and was unclear or requested clarity from the Contractor. Price proposals submitted to the SSTEP panel.

July 12, 2021, the Contracting Specialist after reviewing the price proposal for Children's National Medical Center discovered a that the vendor did not submit a subcontracting plan but had requested that the agency due a subcontracting waiver request was submitted for \$24,000 and not 35%.

July 20, 2021, Children's National Medical Center was sent non-responsive notification via email to [REDACTED] specifically stating: "... the response that you submitted to the Solicitation has been deemed non-responsive, because of your failure to submit a subcontracting plan that is required by law if the dollar value of the response/offeror is in excess of \$250,000.00."

August 20, 2021, due to the SSTEP Evaluation Team not being satisfied with the technical proposal submitted by Paving the Way Multi Service Institute, the SSTEP concluded that the proposal could possibly be improved with clarifications to the questions in the proposal. The Contracting Officer made the determination that it is in the best interest to request a best and final offer, (BAFO) to Paving the Way Multi Services Institute. OCP/DBH requested a BAFO via email to Paving the Way Multi Service Institute.

August 24, 2021, Paving the Way Multi-Service Institute submitted their BAFO

August 24, 2021, BAFO sent to SSTEP for evaluation.

August 24, 2021, OCP/DBH received notice of Protest filed CAB No. P.1144

September 1, 2021: The memorandum from the contracting officer to the Judge assigned the protest was prepared and sent to OAG for filing which confirmed notices were released to all interested parties in accordance with protest requirements.